
IN THE
Supreme Court of the United States

OCTOBER TERM, 1975
NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.

Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 520 F.2d 913 (6th Cir. 1975) and is set forth in Appendix A to the Petition for Writ of Certiorari herein.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 30, 1975. An application for rehearing was timely filed and denied on September 15, 1975. On October 6, 1975, Mr. Justice Stewart granted an extension of time to and including November 14, 1975, within which to file a Petition for Writ of Certiorari. The Petition was filed on November 13, 1975 and it was granted on March 1, 1976. This Court's jurisdiction is invoked under Title 28, United States Code § 1254 (1).

QUESTIONS PRESENTED

1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in *Miller v. California* and its companion cases are entitled to jury instructions founded upon the *Roth-Memoirs* obscenity formulation prevailing at the time of their conduct?

2. Whether an appellate court, in performing its duty enunciated in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?

3. Whether a jury may be instructed to determine the issue of obscenity on the basis of community standards based upon a community comprised of the precise geographical boundaries of a federal judicial district when all of the jurors are both drawn from and constantly exposed to the influences of other communities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the First Amendment are:

"Congress shall make no . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT

Petitioners were charged in the Eastern District of Kentucky with conspiracy and substantive counts related to the interstate transportation of obscene films for the purpose of sale and distribution in violation of Title 18, United States Code, §§ 371 and 1465.

Each of the substantive charges related to a separate allegedly obscene film exhibited at the Cinema X Theatre in Newport, Kentucky, the indictment charging said films had been transported in interstate commerce for the purpose of exhibition there. The conspiracy consisted of an alleged agreement among Petitioners to cause those instances of interstate transportation.

All of the conduct which formed the basis for the substantive counts of the indictment occurred between January 15, 1973 and February 27, 1973. The conspiracy count was

predicated upon an alleged agreement beginning August 1, 1970, and continuing through February 27, 1973. Thus the latest date pertinent to any of the conduct charged against Petitioners was February 27, 1973, several months prior to the announcement by this Court, on June 21, 1973, of new constitutional guidelines in the area of obscenity regulation.

The case came to be heard by a jury in a trial commencing October 9, 1973. Because the conduct for which Petitioners were prosecuted occurred prior to this Court's formulation of new obscenity standards in *Miller v. California*, 413 U.S. 15 (1973) and its companion cases, the Petitioners requested the Court to instruct the jury on the "*Roth-Memoirs*" obscenity formulation set forth in *Memoirs v. Massachusetts*, 383 U.S. 413 (1969) and *Roth v. United States*, 354 U.S. 476 (1957). The Court refused the request and, over objection, instructed the jury on the "*Miller*" obscenity formulation.

The jury was further instructed that the obscenity of the films was to be judged by the application of local community standards. They were instructed, over objection, that the community from which those standards were to be drawn was that comprised solely of the Eastern District of Kentucky. Petitioners objected to this charge on the ground that the subject films were exhibited at a theater located in what is essentially a single urban area comprised of the adjacent cities of Newport, Kentucky and Cincinnati, Ohio. The community instructed upon excluded the Cincinnati area and included much of rural Eastern Kentucky.

After conviction, Petitioners herein appealed and the United States Court of Appeals for the Sixth Circuit affirmed the judgments of conviction in a split decision. A Petition for

Rehearing was timely filed and denied in a further split decision. On Appeal, the Court of Appeals was asked to make an independent determination of the alleged obscenity of the films upon which the convictions rested. In performing this duty of independent appellate review, the Court of Appeals found all of the films obscene but failed to view any of them.

ARGUMENT

I

INSTRUCTING THE JURY ON OBSCENITY STANDARDS WHICH WERE NOT FORMULATED UNTIL AFTER THE CONDUCT WITH WHICH PETITIONERS WERE CHARGED DEPRIVED PETITIONERS OF A FAIR TRIAL AND DUE PROCESS CONTRARY TO THE FIRST, FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The conduct upon which Petitioners' convictions rest all occurred several months prior to the announcement by this Court, on June 21, 1973, of new constitutional guidelines in the area of obscenity regulations. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. Twelve Two-hundred Foot Reels*, 413 U.S. 123 (1973); *United States v. Orto*, 413 U.S. 139 (1973).

The conduct with which Petitioners were charged thus occurred when the prevailing obscenity formulation was that definition commonly referred to as the "*Roth-Memoirs*" standard. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957). Though Petitioners

requested jury instructions predicated upon the *Roth-Memoirs* guidelines which prevailed at the time of their conduct, the District Court instructed the jury on the newer obscenity standards set forth in *Miller*.

The propriety of the course taken by the District Court below has been reviewed and rejected by the United States Courts of Appeals for the First, Fifth, Ninth, and District of Columbia Circuits. All of those Courts found such action, in the circumstances presented below, to constitute a denial of due process.

The Ninth Circuit Court of Appeals was the first to be presented with a fact situation identical to that existing below — a post-*Miller* obscenity trial predicated upon pre-*Miller* conduct. *United States v. Jacobs*, 513 F.2d 564 (9th Cir. 1975). In that case *Jacobs* was indicted for knowingly receiving an obscene film transported in interstate commerce in violation of 18 U.S.C. § 1462. The indictment was handed up after the *Miller* decision, but the date of the alleged offense was May 10, 1973, prior to *Miller*. Just as in this case, the District Court in *Jacobs* instructed the jury on the basis of *Miller* obscenity standards. The Court of Appeals reversed, finding such instructions constituted a due process violation equivalent in effect to an *ex post facto* law. In this regard the court noted:

"The jury which convicted appellant was instructed using the definition of 'obscenity' enunciated in *Miller*, rather than the *Roth-Memoirs* definition which preceded it. Appellant argues that the *Miller* definition expanded the area of unprotected speech which is now made subject to criminal sanction under § 1462, and that retroactive application of

such expanded standards to his conduct was effectively the application of *ex post facto* law, violating his due process right to notice of the conduct proscribed. As we agree that the *Roth-Memoirs* gloss on 'obscenity' did not give appellant adequate notice that his conduct would be judged by the expanded standard ultimately applied, we reverse his conviction." 513 F.2d, at 565.

The Ninth Circuit went on to note the reasoning behind their conclusion that the application of the new standards would constitute a denial of due process. Observing that the enunciation of the *Miller* decision expanded the field of potential criminal liability, the Court held that due process prohibits the retroactive judgment of one's conduct on the basis of that expanded standard. As the Court itself stated:

"We think that it is beyond controversy that the third prong of the *Miller* test expanded the field of potential criminal liability; indeed, the test was explicitly adopted to ease the prosecutor's burden. *Miller*, at 22, 93 S.Ct. 2607. When appellant received the film, he would have thought the act proscribed if he thought a jury would ultimately decide that the film was 'utterly without redeeming social value.' He could not have known that it was a crime to receive a pruriently interesting film which a jury might later determine to be lacking in 'serious literary, artistic, political or scientific value.' As appellant lacked notice of the subsequent expansion of the statute, due process fairness bars the retroactive judgment of his conduct using the expanded definition, and the conviction cannot stand." 513 F.2d, at 566.

The same fact situation was later presented to the Fifth Circuit in *United States v. Wasserman*, 504 F.2d 1012 (5th

Cir. 1974). The defendants in *Wasserman* were indicted in 1972 for conduct which occurred from 1970 through 1972. Subsequent to their indictment, however, the *Miller* decision was announced and the jury was instructed on the obscenity definition set forth in *Miller*. In reversing the conviction, the Fifth Circuit acknowledged and expressly followed the Ninth Circuit decision in *Jacob*, 504, F.2d, at 1014-1015.

In *Wasserman* the Fifth Circuit expressly noted that the constitutional prohibition against *ex post facto* laws was not applicable since it related only to legislation and not to judicial interpretation. *James v. United States*, 366 U.S. 213, 247-248 (1961). It was nonetheless held that the policy considerations underlying the prohibition of *ex post facto* laws are also present with respect to judicial decisions which affect the interpretation of a criminal statute. In either case, policy considerations mandate against punishing an individual for acts which, at the time they were performed, were not within the reach of a criminal statute.

In this regard the Fifth Circuit noted:

"Prior to *Miller*, a distributor of sexually oriented material could not recognize that material which simply lacked 'serious literary, artistic, political or scientific value' could be constitutionally regulated. As far as such a distributor could determine, he was protected as long as the material was not utterly without redeeming social value." 504 F.2d, at 1015-1016.

Precisely the same conclusion as to the mandates of due process was reached by the Court of Appeals for the District of Columbia Circuit in *United States v. Sherpax, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975). That case, like the instant one,

involved *Miller* based jury instructions in a prosecution for pre-*Miller* conduct. In reversing the convictions, the Court of Appeals noted:

"At the times appellants distributed and exhibited the film, they could expect to escape conviction unless a jury concluded that the film was 'utterly without redeeming social value.' Since appellants were not afforded the opportunity to conform their behavior to the law as subsequently construed, due process bars the retroactive application of *Miller* test (c), and the instant convictions must be reversed." 512 F.2d, at 1366.

The same due process considerations influenced the First Circuit in *United States v. Palladino*, 490 F.2d 499 (1st Cir. 1974). That case involved a slightly different fact situation with both the conduct and the trial occurring prior to *Miller*. The question there was what standard to apply upon appellate review when such review occurs subsequent to *Miller*. In holding that such defendants could not be subjected to any of the detriments or harsher standards brought about by *Miller*, the Court of Appeals noted:

"The defendants are caught in a period of transition, their prosecutions having taken place before the *Miller* decisions. They cannot fairly be subjected to penalties for violations of rules established after their actions." 490 F.2d, at 500 (emphasis added).

The above decisions of various Courts of Appeal follow along the lines of reasoning enunciated by this Court in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). The Court there held that enlargement of a criminal statute through judicial

construction precipitates considerations much like those underlying the prohibition against *ex post facto* laws. Noting the fundamental principal of law that "the required criminal law must have existed when the conduct in issue occurred," the court went on to state that that principal must apply "to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." 378 U.S., at 354. Noting the similarity with *ex post facto* laws, the Court stated:

"In unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids." 378 U.S., at 353.

It cannot be disputed that the enunciation of new obscenity standards in *Miller* broadened the availability of criminal sanctions. Indeed, this Court put forth the easing of the prosecutor's burden as one justification for its decision, noting that the government under existing standards shouldered "a burden virtually impossible to discharge under our criminal standards of proof." 413 U.S., at 22. However legitimate and well founded, the removal of this "virtually impossible" prosecutorial burden was surely an unpredictable expansion of the law. No reasonable man could possibly be held to have foreseen, prior to *Miller*, that he could be convicted for the distribution of material merely because it lacked serious literary, artistic, political or scientific value.

This Court, in *Hamling v. United States*, 418 U.S. 87 (1974), implicitly recognized the due process problems inherent in any retroactive application of the expansion in the law brought about by *Miller*. The conviction in *Hamling* was on appeal when the *Miller* decision was announced, and this

Court thus held the petitioner entitled to review on the principals laid down in *Miller*. The entitlement, however, was limited to the *benefits* of the new principals enunciated in *Miller*:

"Thus any constitutional principal enunciated in *Miller* which would serve to benefit Petitioners must be applied in their case." 418 U.S., at 102.

It is true that the court in *Hamling* stated that its *Miller* decision merely added a "clarifying gloss" to the prior construction of the federal obscenity statutes. 418 U.S., at 116. That statement was made, however, only in rejecting Petitioner's argument therein that the statute was unconstitutionally vague prior to *Miller*. Thus the Court merely held that the federal obscenity statutes were constitutionally specific under both the *Roth-Memoirs* clarifying gloss and under the later *Miller* clarifying gloss. *Id.* There can be no doubt that, although definite under either gloss, the law underwent a marked change in *Miller*. This marked change was not foreseeable and it is thus violative of the most fundamental precepts of due process to apply it to Petitioners herein.

Finally, it should be noted that the gratuitous statement of the Court of Appeals herein that the films are obscene under any standard is not relevant to the question here presented. The issue before the Court deals with the propriety of jury instructions. The Petitioners contend that, since their conduct occurred prior to the enunciation of *Miller*, that they were entitled to jury instructions based upon the *Roth-Memoirs* obscenity formulation. The petitioners in *Hamling* and in the *Miller* cases all had the benefit of a jury instructed on the *Roth-Memoirs* formulation. A jury so instructed might well have found the films not obscene and the issue would thus

never have been before the Court of Appeals or this Court. A jury sitting in a state civil proceeding in Cincinnati, Ohio during the same period as the trial herein found one of the films here involved not obscene under the *Roth-Memoirs* formulation. With all due deference to the opinion of the Court of Appeals as to these films, what Petitioners seek is the opinion of a properly instructed jury.

II.

AN APPELLATE COURT PERFORMING ITS DUTY OF INDEPENDENTLY DETERMINING THE ISSUE OF OBSCENITY MUST VIEW THE MATERIALS CHARGED AS OBSCENE.

On appeal, the Petitioners' questioned the obscenity of the materials on which they were convicted. In this regard, the Court of Appeals was requested to review the materials charged as obscene and to make an independent determination of that question. In affirming the convictions, however, the court failed to make any such independent review of the materials. It was thus noted in dissent that:

"Although the challenged films were lodged with the court as exhibits, the majority of the panel decided that an examination of them was not necessary for decision. Accordingly, the films were not seen by any member of the panel." 520 F.2d, at 923 n.1.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding

delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter.

This Court reversed in a judgment announced by Mr. Justice Harlan. The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case so that the initial determination of the obscenity issue judged by proper standards could be made in the lower court:

"Whether this question [of obscenity] be deemed one of fact or mixed fact and law, see Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determination of that issue must ultimately rest with it:

"That issue, involving factual matters entangled in a constitutional claim, see *Grove Press, Inc. v. Christenberry* (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day*, *supra*, stated:

"Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States*, *supra*, 354 U.S., at 497-498, 1 L.Ed.2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' *Id.*, at 498, 1 L.Ed.2d at 1514; see *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488, 8 L.Ed.2d 639, 647, 82 S.Ct. 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

"We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a

difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was recently affirmed by this Court in *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene. This same course of independent review has been followed here in several cases. See, e.g., *Kols v. Wisconsin*, 408 U.S. 229 (1972); *Hamling v. United States*, 418 U.S. 87 (1974).

The necessity of independent review derives from the fact that the classification of materials as obscene is a constitutional decision. This is so because materials which are not obscene are constitutionally protected and their distribution or exhibition may not, consistent with the First Amendment, form the basis for a criminal conviction. Further, in making this determination of constitutional law, the material must be judged "as a whole." *Miller v. California*, 413 U.S. 15, 24 (1973). No decision of such constitutional magnitude can be made any other way. It is necessary so that distributors of

protected First Amendment materials may operate free from the chilling effect which would occur in the absence of complete appellate review. Thus the distributors of the motion picture film "Carnal Knowledge" knew that they could not be punished for their activity until this Court had independently viewed the film and determined its constitutional status as protected or unprotected speech. In the sensitive area of First Amendment freedoms, a chilling effect will necessarily result unless the availability of this complete appellate review is reaffirmed.

III.

THE DENIAL OF PETITIONERS' REQUESTS TO CHARGE THE JURY ON THE LOCAL COMMUNITY STANDARDS OF CINCINNATI-COVINGTON AND INSTRUCTING THE JURY ON THE COMMUNITY STANDARDS OF THE ENTIRE EASTERN DISTRICT OF KENTUCKY DENIED PETITIONERS A FAIR TRIAL AND DUE PROCESS, CONTRARY TO THE FIRST, FIFTH, AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The jury below was instructed to determine the obscenity of the materials charged against the Petitioners' on the basis of local community standards. *Miller v. California*, 413 U.S. 15 (1973). That local community was defined by the court as encompassing the geographical boundaries of Eastern District of Kentucky. Petitioners' objected to that definition of the community and requested that the jury be charged on the basis of local community standards in the Cincinnati metropolitan area. That area comprises the city of Cincinnati and several suburbs, many of which, including Newport and Covington, are in Kentucky.

The charges against Petitioners were predicated upon interstate transportation of films for the purpose of exhibition at the Cinema-X Theater in Newport, Kentucky. As has been stated, Newport is a suburb of Cincinnati, Ohio and is directly connected to Cincinnati by a bridge spanning the Ohio River. The trial herein took place in Covington, Kentucky which is yet another suburb of Cincinnati, Ohio, directly connected to Cincinnati by another bridge spanning the Ohio River.

It cannot be disputed that major influences upon the residents of Newport and Covington, Kentucky derive from Cincinnati, Ohio. The only major newspapers serving those communities is the Cincinnati Post. Stations located in Cincinnati constitute the only source of television transmissions in the area. The major radio stations are also located in Cincinnati.

The jury panel below was drawn only from the metropolitan Covington area. Furthermore, at least half of the jurors, although living in Covington, worked in Cincinnati, Ohio. They were thus directly exposed to the influences of the Cincinnati area in connection with their employment. This exposure, moreover, is in addition to the media exposure of Cincinnati which extends to all Covington residents through the television and newspaper sources described above.

Despite the fact that all the jurors were thus drawn from a suburb of Cincinnati and that half of them worked in Cincinnati, the jury was instructed to assess the materials on the basis of the local community standards of the Eastern District of Kentucky. The Eastern District of Kentucky covers the entire eastern half of the state, running from Ohio on the north, to Tennessee on the south and to West Virginia and

Virginia on the east. The district is comprised of sixty-seven different counties and encompasses the major cities of Covington, Newport, Ashland, Frankfort, and Lexington, Kentucky. The district includes the urban areas in and around the aforementioned cities as well as the open country and hill areas of the Cumberland Mountains and Appalachia. It was the standards of this area upon which the jury was instructed to determine the obscenity of the materials charged against Petitioners.

To thus define the "community" by the precise political-geographic boundary of the Eastern District of Kentucky does violence to the principals of due process and fair trial. A community does not arbitrarily originate or terminate at a political boundary. The major metropolitan area of Cincinnati, Ohio is the "community" from which the jurors were drawn, to which the jurors were exposed, and in which the materials were exhibited. Despite this, the "community" upon which the instructions were predicated was a political one including the Cumberland Mountains and Appalachia, hundreds of miles away.

Any deliniation of the proper community on which to judge materials must begin with *Miller v. California*, 413 U.S. 15 (1973). This court there held that the obscenity of materials need not be judged by national standards which the court held were impossible and unworkable. The application of state-wide local standards was approved in *Miller*, but the court left unclear the limits on how the "local community" is to be defined in each instance.

The issue received some clarification in *Hamling v. United States*, 418 U.S. 87 (1974). *Hamling* rejected the contention

that the state-wide community approved in *Miller* constituted the only acceptable local community. 418 U.S., at 105. The Southern District of California was there approved as one permissible local community.

In approving the federal judicial district as an acceptable local community, however, the court indulged in a crucial presumption:

"Since this case was tried in the Southern District of California, and presumably jurors from throughout the district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw." 418 U.S., at 105-106 (emphasis added).

The presumption indulged in *Hamling* regarding the source of the jurors is not appropriate here. The jurors were *not* drawn from the entire Eastern District of Kentucky, but rather only from the metropolitan Covington area.

The teaching of *Hamling*, with respect to the definition of the local community, may be briefly stated as follows:

"A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination." 418 U.S., at 104.

The court goes on to restate the above proposition as follows:

"The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory

construction, is to permit the jurors sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person applying contemporary community standards' would reach in a given case." 418 U.S., at 105.

Upon the application of the above standards to this case, it can be seen that the instructions below were clearly erroneous. The community or vicinage from which the jurors were drawn is the metropolitan Covington area. They were constantly exposed to media coverage deriving from Cincinnati and over half of them spent their working hours in Cincinnati. Despite this, they were instructed to excise Cincinnati from their consideration. Further, they were instructed to include rural areas including portions of Appalachia from which none of them were drawn and to which none of them were exposed.

In *Hamling* this court made clear that jurors must be instructed on the local community or vicinage from which they are drawn and to which they are exposed. In that regard, the instructions in this case were both over and under inclusive. They were over inclusive by instructing the jurors to apply standards from vast rural areas to which none of the jurors were exposed and from which none were drawn. They were under inclusive by reason of their excision of Cincinnati, Ohio which is a community or vicinage to which all of the jurors were constantly exposed and in which half of the jurors worked. On the basis of *Hamling* therefore the decision below must be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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